Remarks of FCC Commissioner Robert M. McDowell
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Thank you, Grant. You and your team have put together another impressive show.

It's great to be back in Texas. My family has deep roots in the Lone Star State – more than five generations worth, in fact. My great-great grandfather, James Knox McDowell, was an abolitionist who moved here before the Civil War. As a fan of Abe Lincoln's, he helped found a fledgling new political party, known as the Republican Party. That started a long line of Republicans in the McDowell family. Of course, back in those days, you could ride across the dusty plains of Texas for days and never see any sign of another Republican. There were so few Republicans here that James cast the only vote in his county against secession – the *only* vote.

After enduring a great deal of hardship during and after the War, including surviving a failed lynching at the hands of the Klan, James and his wife, Victoria, went on to raise five sons. One of them, C.K. McDowell, my great grandfather, went from working as a ranch hand and cowboy living in a frontier dugout, to reading the law and becoming an attorney. After the turn of the century, somehow he was elected chief judge of Val Verde County. Upon his election, a riot broke out in the town of Del Rio because he was … well, a Republican. The Texas Rangers had to be called in to quell the violence. (Not the baseball team, the horsemen with guns.) But his picture still hangs on a wall in the old courthouse in Del Rio. For decades, he was the *only* Republican on that wall.

In his later years, he went on to run for governor of Texas and won the Republican nomination in 1942. Keep in mind that back then the Republican Party of Texas could have held its convention in a phone booth. For all I know, he was nominated by default because no one else wanted the "honor." But while writing this speech, I thought I would look up the election results from his race. Ready? It ends up that the incumbent governor, Coke R. Stevenson, garnered 280,735 votes. Judge Caswell Kelliston McDowell hauled in 9,204 votes. That translated into a whopping 3.17 percent. Some would call that a "rounding error."

So what does any of this have to do with the FCC? Well … it seems that we McDowells have a knack for picking places where we end up being the *only* Republican. And while there are a lot more Republicans in Texas these days, there are no more Texas Republicans on the FCC. I had no idea that my family history was preparing me for such loneliness and being on the short end of votes – the shortest of short ends, in fact. But it all makes sense to me now.

3.17 percent. That's quite a number. So let's change the subject and take a look at another number: 463. That was the total number of pages in the FCC's portion of the Code of Federal Regulations – the "CFR" – 50 years ago. The CFR is the book that contains most of the federal government's regulations affecting our country's economy. And at the time of then-FCC Chairman Newt Minow's famous "TV is a vast wasteland" speech, in 1961, all of the FCC's rules governing radio, television, telegraphs, telephones and such could fit neatly into 463 pages. Keep in mind, in 1961 Americans only had a choice of three TV networks and one phone company. Today, over-the-air and cable TV, satellite TV and radio, and the millions of content suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

By late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. With the '96 Act, Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grew, deregulation – *DE*regulation – in this economic sector should take place. The legislative intent of key parts of the '96 Act, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, information services and broadcasting. In fact, the Act states that the FCC should "promote competition and reduce regulation."[1] But, as it ends up, just the opposite occurred. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. That's right, after a landmark *de*regulatory act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth of 800 percent, America's GDP grew by a substantially smaller number: 357 percent.[2] In short, this is one imperfect but relevant metric illustrating growth in government outpacing economic growth.

To be fair to the Commission, some of those thousands of pages of rules were written due to congressional mandates. And sometimes the FCC does remove rules from its books as the

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[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

[2] The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," http://www.bea.gov/national/index.htm#gdp; *see also id*., "Current and Real Gross Domestic Product," http://www.bea.gov/national/xls/gdplev.xls.

result of forbearance petitions, or by its own accord, just as we did last week with some international reporting requirements. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

Now at this point I need to issue a warning. For the next couple of minutes, I'm going to sound like a lawyer.

As both former FCC Commissioner Harold Furtchgott-Roth and the Free State Foundation's Randy May have written recently, Congress ordered the FCC through Section 10 of the '96 Act to "forbear" from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and "not necessary for the protection of consumers."[3] Similarly, Section 11, the less famous sibling of Section 10, requires the FCC to conduct reviews of telecom rules every two years to determine "whether any such regulation is no longer in the public interest as the result of meaningful economic competition,"[4] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[5]

Please keep in mind that removing unnecessary or harmful rules is by no means a partisan concept. The '96 Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. And on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."[6] As he wrote in the *Wall Street Journal*, he is seeking to "remove outdated regulations that stifle job creation and make our economy less competitive."[7]

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[3] 47 U.S.C. §160(a)(2).
[4] 47 U.S.C. §161(a)(2).
[5] 47 U.S.C. §161(b).
[6] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).
[7] President Barack Obama, *Toward a 21st-Century Regulatory System,* WALL ST. J., Jan. 18, 2011.

So, having established that we have strong bipartisan support to deregulate, let's get to work. Removing unneeded rules can liberate capital currently spent on lawyers and filing fees – capital that would be better spent on powerful new communications equipment. Accordingly, I call on the Chairman and my fellow commissioners to stay faithful to Congress's intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of our review should be that a rule is not necessary unless we find compelling evidence to the contrary.

Of course, the first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as "net neutrality." As I have stated numerous times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. But to be realistic, reversal of them will have to be at the hands of the courts or Congress.

Similarly, it would take congressional action to start to erase the regulatory stovepipes created by Titles I, II, III and VI. Products and services are converging across platforms. So should the statute.

But here are a few other rules the FCC could get rid of itself.

Did you know that many phone companies are still required to read aloud to new customers a list of available independent long distance companies? This so-called "equal access" scripting requirement is a dusty old vestige from the break-up of the AT&T long distance monopoly. Ma Bell's long distance arm was declared "non-dominant" way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on like a slumbering Rip Van Winkle who fell asleep in the 1980s.

Ironically, these rules no longer apply to the Baby Bells or their successors, and have never applied to wireless carriers. It is smaller phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies – are always paid for, ultimately, by consumers. It took the Commission about a year to put out for public comment a 2008 petition to eliminate these dinosaurs, and we are several years overdue to repeal them.

Similarly, it is smaller non-Bell companies that must live under cost allocation requirements and ARMIS (Automatic Reporting Management Information System) reporting mandates. For carriers living under flexible price cap rules in an environment that is more competitive than a few years ago, these cumbersome and costly requirements make no sense.

Then there are the forms – lots of forms. Government bureaucracies *love* to require people to fill out forms. There is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take for example, my "favorite" form, the enhanced disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Proponents of this rule may have meant well. In fact, at the time of its adoption I overheard one advocate exclaim joyfully, "Two full-time jobs? That's terrific. That's job creation!" Of course, they didn't realize that the new requirement would result in the *elimination* of two jobs elsewhere at the station, such as the newsroom, to pay for the new mandate.

Also, unless I'm missing something, TV stations don't aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV – all Big Brother and First Amendment concerns aside.

The good news is that the enhanced disclosure form has been held up by the Office of Management and Budget (OMB) since 2008 because it raises Paperwork Reduction Act problems, among other things. And, yes, that's the same office that has temporarily held up the effectiveness of the net neutrality rules. Given that both the Bush and Obama White Houses have kept it from going into effect, why don't we just put it out of its – and our – misery and repeal it?

I'm not saying that all forms are unnecessary. But multiple forms sometimes collect the same data, such as Form 477 collecting the same ownership information required by Form 602. Do we really need to kill America's information economy with a thousand paper cuts?

And now, if you have fallen asleep, this last part should wake you up. In fact, the likely headline coming out of this speech will have nothing to do with telecom equipment. Sorry about that. Are you ready? It is rare that the English language can come up with two words that, when put together, generate so much controversy. This is potent stuff, so you'd better brace yourself. The … Fairness Doctrine. It still exists! No, it doesn't still exist the way Elvis "still exists." The Fairness Doctrine is literally still codified in the CFR.[8] We stumbled on this forgotten fact while researching material for this speech.

For those of you who have no idea what I am talking about, the Fairness Doctrine was a rule … well, still IS a rule, apparently … that thrust the government's coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Suffice it to say that political speech is core protected speech under the First Amendment, and the Fairness

[8] 47 C.F.R. § 73.1910 (broadcasting); 47 C.F.R. § 76.209 ("origination cablecasting").

Doctrine is patently unconstitutional. The FCC decided as much in 1987 when everyone assumed the FCC killed it. We thought that this monster's dead and stinking corpse was left to rot in a government graveyard. Instead, it appears that the Commission merely opted not to enforce the rule. Its words still defile the pages of the CFR, and we should erase it with a repeal order immediately.

In closing, a comprehensive and sustained effort to repeal and streamline unnecessary, outdated or harmful FCC rules would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate. With the certainty that the Commission will not only refrain from issuing new unneeded rules, but weed out old ones as well, investment capital is more likely to start flowing again.

Congress could do its part as well. Adoption of tax policies that accelerate depreciation schedules for tech equipment and classify some capital investments as expenses have a history of stimulating economic activity and job creation. By some estimates, every one dollar in accelerated depreciation tax incentives generates nine dollars in GDP growth.[9] One study estimated that the tech tax incentives of 2002 and 2003 may have increased GDP by $20 billion and affected the creation and retention of up to 200,000 jobs.[10]

The bottom line is the bottom line. History teaches us over and over again: Decreasing the burdens of onerous regulatory and taxation policies increases investment (which means more purchases of telecom equipment), spurs innovation, accelerates competition, lowers prices, creates jobs and pleases consumers. So what is there not to like? Let's get on with such a program right away.

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[9] Robbins, Aldona and Gary, *What's the Most Potent Way to Stimulate the Economy?,* INSTITUTE FOR POLICY INNOVATION (Oct. 10, 2001).

[10] House, Christopher L. and Shapiro, Matthew D., *Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation,* Am. Economic Rev. (2008).

Thank you for having me here today, and I look forward to your questions.